FINAL REPLY BRIEF
ORAL ARGUMENT NOT YET SCHEDULED
Case Nos. 18-1091 and 18-1153

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

First Student, Inc., a Division of First Group America
Petitioner/Cross-Respondent

v.

National Labor Relations Board
Respondent/Cross-Petitioner

United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial & Service Workers International Union, AFL-CIO, Local 9036
Intervenor

ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF A DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD

REPLY BRIEF OF PETITIONER/CROSS-RESPONDENT FIRST STUDENT, INC.

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*Authorities upon which First Student chiefly relies are marked with an asterick.

GLOSSARY OF ABBREVIATIONS

Abbreviation	Definition
The Act or NLRA	National Labor Relations Act
The ALJ	Administrative Law Judge Mark Carissimi
The Board or NLRB	National Labor Relations Board
General Counsel	The Board's General Counsel and trial attorneys
First Student or the Company	First Student, Inc.
The Union	Local 9036, United Steel, Paper and Forestry, Rubber, Manufacturing, energy, Allied Industrial and Service Workers International Union (USW) AFL-CIO
The District	Saginaw, Michigan School District
The Board of Education	Saginaw, Michigan School District Board of Education
The District CBA	The Collective-Bargaining Agreement between the Union and the District's Board of Education
The Board's Decision or Board Decision	The Decision and Order of the Board under review
Tr.	Hearing Transcript
CEX	Company Exhibit
GCX	General Counsel Exhibit
UEX	Union Exhibit
The Board's Brief	Board Brief
The Union's Brief	Union Brief

I. INTRODUCTION

In this reply brief, First Student addresses the principal arguments advanced by the Board and the Union. The Company demonstrates none of those arguments suffice to counter the Company's showing that the Board erred in finding the Company is a perfectly clear successor and did not have the right unilaterally to implement the initial terms and conditions under which it employed the District's employees.

II. SUMMARY OF ARGUMENT

1. The Board and the Union fail to counter First Student's argument that the Board erred in finding the Company became a perfectly clear successor before it entered into a contract with the District. First Student demonstrates the authorities on which the Board and the Union rely are unavailing, as is their attempt to distinguish the authorities on which the Company relies. The Company also demonstrates the Board's finding the Company's pre-contract statements triggered perfectly clear successor status conflict with the policy considerations underlying the Supreme Court's decision in *NLRB v. Burns Int'l Security Services*, 406 U.S. 272 (1972), and the Board's decision in *Spruce Up,* 209 NLRB 194, 195, enfd. mem. 529 F.2d 516 (4th Cir. 1975).

2. The Board and the Union do not present any arguments or authorities that overcome First Student's showing that the test adopted by the Board in *Nexeo Solutions, LLC*, 364 NLRB No. 44 (2016) (the "*Nexeo* test"), on which the Board

relied in the Decision, is materially different from and cannot be reconciled with the *Spruce Up* test. In particular, they have no answer for the Company's argument that in two ways the *Nexeo* test conflicts with this Court's interpretation and application of the *Spruce Up* test in *S&F Market Street Healthcare LLC v. NLRB,* 570 F.3d 354 (D.C. Cir. 2009). First, the *Nexeo* test eliminates the first prong of the *Spruce Test* and in the process changes the presumption that a successor has the right unilaterally to set initial terms of employment to one that a successor that communicates an intention to retain the predecessor's employees must bargain over initial employment terms unless it makes clear in its communication that employment is conditioned upon acceptance of new terms. Second, the *Nexeo* test requires a successor to show it clearly communicated to a predecessor's employees employment would be conditioned on acceptance of new terms, while the *Spruce Up* test assesses whether the successor's communications portended employment under new terms. Under either the *Nexeo* test or the *Spruce Up* test, the information First Student communicated to the District's employees on March 2, 2012, placed the employees on notice the Company would be implementing new terms, precluding the Company from becoming a perfectly clear successor.

3. The Board's interpretation of the Act permanently to foreclose a successor, once it becomes a perfectly clear successor, from recapturing its right unilaterally to set initial employment terms is overbroad and unreasonable. The Act should be interpreted to permit a perfectly clear successor unilaterally to set

initial employment terms if doing so would not have an effect on the predecessor employees' reliance interest, or the successors' economic interests, on balance, outweigh the employees' reliance interests. Room exists under this Court's decision in *Int'l Ass'n of Machinists & Aerospace Workers v. NLRB*, 595 F.2d 664 (D.C. Cir. 1978) for such an interpretation.

III. ARGUMENT

A. The Board Erred In Finding First Student Became A Perfectly Clear Successor Before It Entered Into A Contract With The District

In its principal brief, First Student argues that prior to this case the Board had not interpreted the Act to permit a perfectly clear bargaining obligation to be imposed before a successor enters into an agreement to acquire or assume a predecessor's business operations. In their briefs, the Board and the Union dispute that contention by pointing to a handful of cases they argue show the absence of a contract does not preclude the imposition of perfectly clear successor status. Included among them are *Elf Atochem North America, Inc.*, 339 NLRB 796 (2003), and *Spitzer Akron, Inc. v. NLRB*, 540 F.2d 841, 843–845 (6th Cir. 1976), two of the three cases on which the Board relied in the Decision for finding "no impediment to holding that the Respondent's bargaining obligation attached on March 2, notwithstanding that the transportation services contract between the Respondent and the School District was not approved until months later."

(Appendix 632, n.13)[1] (Board Brief p.34; Union Brief pp.27-28).[2]

In *Elf*, the Board and Union say, the successor had only entered into a non-binding letter of intent to acquire the stock of the predecessor at the time it was found to have made perfectly clear-triggering statements. They both argue the letter of intent was not a contract. But a fair reading of the decision indicates that is not true. Four considerations, among others, demonstrate that the letter of intent was, and that the parties behaved as if it was, a contract: (1) the parties issued, on the same day, a joint press release announcing the signing of the letter of intent and memos to the employees informing them of the successor's agreement to employ them under equivalent salaries and comparable benefits as the predecessor; (2) in the ensuing months prior to the closing on the sale, the predecessor and successor took actions in preparation for that sale that treated the agreement as binding; (3) while the predecessor told the union there was a "signed non-binding letter of intent," it provided the union with a document entitled, "Heads of Agreement," which "outlined the general principles of the sale" and to which the parties looked leading up to the sale; and (4) as far as the decision reveals, the letter of intent was never replaced by any other agreement before the sale was consummated. 339 NLRB at 798-800, 807.

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[1] "Appendix" refers to the parties' deferred joint appendix.

[2] In the third case, *Nexeo*, the Board found Nexeo was a perfectly clear successor based upon information the predecessor communicated to its employees two days *after* the purchase agreement was executed.

In citing *Spitzer,* the Board includes a parenthetical that states the Sixth Circuit relied "on August statements to support perfectly clear successorship where purchase agreement was not consummated until September." (Board Brief p.34). The parenthetical omits that, in its decision, the Board did not rely upon the "August statements" in finding the respondent to be a perfectly clear successor. 219 NLRB 20, 23 (1975). It also omits that the Sixth Circuit only relied upon the August statements in an "assuming *arguendo*" paragraph that followed the Court's upholding the Board's finding the respondent's violation was in unilaterally announcing new terms of employment after it had completed hiring its workforce, i.e., the new terms were not announced prior to or simultaneous with the respondent's hiring of the employees. The Union makes the same point and omits the same information as the Board, saying the Court "found" the August statements triggered perfectly clear successor status. It adds that First Student wrongly contends the Sixth Circuit's decision does not support the Board's position in this case by "misleadingly attempt[ing] to prove this claim by citing to the Board's decision in *Spitzer*...." and charging the Company with inaccurately describing the Board's decision. It is the Union, however, that misapprehends the Board's decision by suggesting the Board found that Spitzer's perfectly clear status was triggered sometime before it had hired its workforce. The Board's and the Court's decisions indicate that the predecessor's employees became employees of the respondent on the day of the sale and that within a few short hours after the sale

was completed the respondent announced new terms of employment, thus violating the bargaining duty that arose upon its hiring the employees earlier in the day. 540 F.2d at 845; 219 NLRB at 23. In challenging the Board's citation of the Sixth Circuit's decision here, the point the Company is making is that the Court's finding the respondent triggered its perfectly clear status with statements it made a month before the sale was hypothetical in nature and based upon an assumption of facts different from those found by the Board.[3]

The Board also takes issue with First Student's reliance on *Morris Healthcare & Rehab Center, LLC,* 348 NLRB 1360 (2006) and *Hilton's Environmental,* 320 NLRB 437 (1995) as cases that teach a successor cannot become a perfectly clear successor until sometime after it enters into a contract to acquire or assume the business of its predecessor. In both cases allegedly perfectly clear successor statements were made by a then prospective successor before a

[3] The Court also misstated to whom the August statements on which it relied for its hypothetical finding were made, stating that "Del Spitzer informed the *employees* that he '[wanted] every man to stay on the job, and would carry on as usual.'" 540 F.2d at 845 (emphasis added). The Board's finding was that:

> When Del Spitzer visited the agency early in August 1970, in connection with family plans for buying the business, *he told mechanic John Hall* that the Spitzers planned to buy the agency, and would need good mechanics. When Hall suggested that he keep all the East Town mechanics, Spitzer replied that he had checked on them, found they were good men, and "I want every man to stay on the job, and we will carry on as usual."

219 NLRB at 22. No mention is made in the decision of Hall's repeating Spitzer's statement to any of his coworkers.

contract was entered – at a public board meeting and on a radio program in *Morris* and to the employees in *Hilton's*. First Student argues that in both cases the Board held the respondent became a perfectly clear successor subsequent to its being awarded the contract, but before commencing operations. The Board argues that its reliance on statements made after contracts were entered "does not mean that the prior ones were insufficient on their own, and nothing in either of those cases suggests otherwise." (Board Brief p.35). The Company disagrees. If the pre-contract statements were sufficient, the Board would have presumably, as it did here, said so. And evidence they were not sufficient can be gleaned from the Board's failure to find that the respondent's bargaining obligation was triggered by any of the pre-contract statements.

The Board lastly points to *Fremont Ford,* 289 NLRB 1290 (1988), arguing that in that case it found the respondent was a perfectly clear successor based upon unconditional retention-related statements the respondent made to the union representative of the predecessor's employees and a couple employees before finalizing its purchase of a car dealership. The Board, however, overlooks that what it characterizes as the finalization of the purchase constituted the final steps in closing on an agreement that was entered months before – an agreement to sell the dealership was reached in early January 1982 and after satisfying a host of requirements on which the sale was conditioned, the sale closed on May 17, 1982. 289 NLRB at 1291, 1296, 1304-1307).

Fremont Ford, like the other cases the Board cites, provides no support for the Board's argument that the Board "has consistently found that perfectly clear successorship can attach before a successor has signed a contract." (Board Brief p.34). Besides the cases themselves betraying that contention, the Board would not have expressed doubt here that a bargaining obligation could arise before a contract was entered if the issue had ever been squarely addressed in the past. (Appendix 632, n.13). The doubt the Board expressed is a reflection that, in the handful of prior cases in which perfectly clear, retention-based statements were made before and after a contract was entered, the Board neither found that the pre-contract statements alone were enough to support a finding of perfectly clear successor status nor offered any explanation or interpretation of the Act that would justify such a finding.

As First Student has argued, the holding that its bargaining obligation attached over two months before its contract with the District was approved is both unprecedented and unexplained. It is also contrary to the principal policy consideration on which the Supreme Court in *Burns*, 406 U.S. at 287-288, grounded its determination that a successor employer ordinarily has the right unilaterally to set initial terms and conditions of employment. That consideration is that a "potential employer may be willing to take over a moribund business only if he can make changes in corporate structure, composition of the labor force, work location, task assignment, and nature of supervision. *Id*. As the Court explained,

"[s]addling such an employer with the terms and conditions of employment contained in the old collective-bargaining contract may make these changes impossible and may discourage and inhibit the transfer of capital." *Id.* at 288. The Board's holding here is entirely at odds with, and if allowed to stand would undermine, this policy consideration. It would do so by exposing a prospective successor to perfectly clear successor status based upon its commenting favorably on the employment prospects of a prospective predecessor's employees during the period that it is negotiating the terms of a contract to purchase or assume a business – terms that may materially change before an agreement is finalized and do so in ways that affect the employment terms the prospective successor is able to offer.[4]

B. The Statements Made By First Student At The March 2, 2012, Employee Meeting And At And After May 16, 2012, Did Not Make It A Perfectly Clear Successor

1. The *Nexeo* Test The Board Applied Is Materially Different From And Cannot Be Reconciled With The *Spruce Up* Test

In response to First Student's charge that the *Nexeo*-based test the Board

[4] Exposing a prospective successor to perfectly clear successor status in the pre-contract context would also trigger the policy concern expressed by the Board in *Spruce Up* that:

> [a]n employer desirous of availing himself of the *Burns* right to set initial terms would . . . have to refrain from commenting favorably at all upon employment prospects of old employees for fear he would thereby forfeit his right to unilaterally set initial terms, a right to which the Supreme court attaches great importance in *Burns*.

209 NLRB at 194.

applied here materially departs from the *Spruce Up* test, the Board counters that in *Nexeo* the Board did not "purport to change the *Spruce Up* test." (Board Brief, p.20, n.3). That is true but of no moment. What matters is that an analysis of the *Nexeo* test demonstrates it changes the substance of the *Spruce Up* test.

The Board defends the *Nexeo* test by submitting that it relied in *Nexeo* on longstanding case law for the proposition that, to avoid perfectly clear successor status, an employer must make it clear, in expressing an intent to retain the predecessor's employees, that employment will be conditioned on acceptance of new terms. (Id.). But the Board here, as in the Decision, does not identify that longstanding case law – the only case the Board cited in *Nexeo* was *Canteen Co.,* 317 NLRB 1052, 1053–1054 (1995) enfd. 103 F.3d 1355 (7th Cir. 1997).

The Union likewise offers a conclusory argument that the Board "applied *Spruce Up* in line with [] well-established principles." To back that up, the Union, begging the question, says the Board first addressed the question whether First Student expressed an intent to retain the employees at the March 2 meeting and then moved onto the question whether the Company clearly announced its intent to establish a new set of conditions prior to or simultaneous with its expression of intent to retain the employees. (Union Brief 30-31).

Neither the Board nor the Union answer the Company's contention that the *Nexeo* test effectively eliminates the first prong of the *Spruce Up* test, the prong restricting the perfectly clear caveat "to circumstances in which the new employer

has either actively or, by tacit inference, misled employees into believing they would all be retained without change in their wages, hours, or conditions of employment." 209 NLRB at 195. In failing to address that contention, they steer clear of this Court's interpretation of the *Spruce Up* test in *S&F Market Street*, which identifies this prong as the one on which the perfectly clear exception is centered. The Court made that point at three points in its decision, saying first:

> [A]t bottom the "perfectly clear" exception is intended to prevent an employer from inducing possibly adverse reliance upon the part of employees it misled or lulled into not looking for other work.

570 F.3d at 359. Then next:

> Recall that the "perfectly clear" exception applies only to cases in which the successor employer has led the predecessor's employees to believe their employment status would continue unchanged after accepting employment with the successor.

Id. at 360. And finally:

> [The Supreme Court and the Board] reserved the "perfectly clear" exception for cases in which employees had been misled into believing their terms and conditions would continue unchanged.

Id. at 361.

By eliminating the first prong of the *Spruce Up* test and replacing it with a test that calls for a finding of perfectly clear status unless a successor, when it first expresses an intent to retain the predecessor's employees, makes it clear employment will be conditioned on new terms, the Board, beginning in *Nexeo,*

effectively returned to the test this Court struck down in *S&F Market Street*.[5] The *Nexeo* test is, thus, incompatible with the *Spruce Up* test, as interpreted by this Court, because it "presume[s] the predecessor's terms and conditions must remain in effect unless the successor employer," *S&F Market Street,* 570 F.3d at 361, makes "it clear that employment will be conditioned on acceptance of new terms." *Nexeo,* 364 NLRB No. 44, slip op. at 5–6. To borrow again from what the Court said in *S&F Market Street,* "[t]hus does the exception in *Burns* swallow the rule in *Burns."* 570 F.3d at 361.

Another way in which the *Nexeo* test is also incompatible with the *Spruce Up* test, again as interpreted by this Court, is that, in requiring a clear statement employment will be conditioned on acceptance of new terms, the *Nexeo* test "require[s] more from the successor employer than a portent of employment under different terms and conditions." *Id.* at 360. Applying the *Spruce Up* test to require only a "portent of employment under different terms and conditions," the Board's finding that First Student failed to insulate itself from being deemed a perfectly clear successor by what was communicated to the District's employees at the March 2, 2012, meeting does not survive.

[5] The only difference between the *Nexeo* test and the test the Board followed in *S&F Market Street* is that, to avoid perfectly clear successor status, a successor under the *Nexeo* test must make a clear announcement employment will conditioned on new terms, while under the test the Board used *S&F Market Street* test, the successor was required to make a clear announcement of changes to "core" terms and conditions of employment. The distinction is one that makes no difference.

2. Information Communicated At The March 2, 2012, Meeting Portended Changes in Employment Terms, Precluding First Student From Being Held To Be A Perfectly Clear Successor

In arguing that First Student failed clearly to communicate at the March 2, 2012, meeting with the District's employees and at and after the School Board meeting on May 16, 2012, that employment with the Company would be conditioned on the acceptance of new terms, the Board and the Union for the most part simply repeat what the Board said in the Decision. When viewed objectively, whether under the *Spruce Up* test, as interpreted by this Court, or the *Nexeo* test, the evidence shows that the Board reached the wrong conclusion. As the ALJ found and Member Kaplan would have found, First Student effectively communicated to the employees at the meeting on March 2, 2012, that new working conditions would be implemented, preserving the Company's right, which it exercised on May 17, 2012, unilaterally to announce new terms and conditions of employment.

First, the employees' knowledge when they came to the meeting that, if the District entered into a contract with First Student, they would be transitioning from a public employer to a private employer could alone be reasonably viewed as signaling to them that their terms of employment would likely change.

Second, the Company did not express at the meeting an unconditional intent to retain the employees. The Company said that, if it entered into a contract with

the District, it would offer employment to employees who completed applications and met its hiring criteria. (Appendix 631, 14). Contrary to the Board's finding, the similarities between the Company's hiring criteria and the District's hiring criteria do not warrant an inference that the employees had no reason to doubt the Company would hire them. The employees had no way of knowing if the Company's decision makers would evaluate the criteria in the same way as the District and some presumably otherwise could not be sure if they would be able to satisfy the criteria. Beyond that, the Board's finding conflicts with the finding by this Court in in *S&F Market Street* that hiring criteria like First Student used, i.e., a requirement that the predecessor's employees pass various pre-employment checks and tests, portended changes to employment terms. 570 F.3d at 359-60.

Third, the Company told the employees at the meeting that representatives of the Company (Meek and one other) would be present to answer questions when the employees received their applications. (Appendix 641). No need would have existed to answer any questions if First Student were simply adopting the terms and conditions under which the employees worked for the District. The message necessarily communicated to the employees that the representatives would be present to answer questions they had about employment terms the Company planned to implement.

Fourth, First Student's statement that it would recognize the Union if the Company hired "51 percent" of the workforce connoted that the Company would

not, consistent with *Burns,* be in a position to determine if it was required to recognize the Union until it had either completed its hiring or hired a representative complement of employees. The Board did not consider the import of what the statement foretold about prospective terms and conditions of employment; rather, it only considered the statement in connection with its analysis whether the Company communicated an intent to retain the employees. (Appendix 631). The statement, however, can reasonably be construed as one that would send a message to the employees that continued union representation was not guaranteed, which, in turn, would portend the potential for changes to employment terms, if and win First Student assumed responsibility for transportation services.

Lastly and most importantly, First Student clearly communicated that it intended to establish new employment terms with its statements that, if it hired 51 percent of the workforce, it would recognize the union but a new contract would be negotiated; certain matters about which employees asked, including paid time off, vacation pay and sick pay, "would be subject to negotiation"; and the Company did not know how many hours employees would be guaranteed because it would depend upon routes that were established.[6] (Appendix 641, 647). In finding

[6] Evidence was also presented, which the ALJ did not find necessary to mention in supporting his findings and the Board did not discuss in the Decision, that at the meeting Kelley Peatross, the District's Assistant Superintendent of Schools, told the employees that if the District entered into a contract with First Student, the District CBA would be "null and void" and that, if awarded a contract, First Student would be a new employer and, if hired, the employees would work under

otherwise, the Board introduced for the first time the novel concept that statements by a successor indicating it is not adopting its predecessor's labor agreement do not foretell employment will be offered under new terms because "it conveys nothing more than a statement of law – that the status quo may change as a result of negotiations, but not in advance of them." (Appendix 631). The flaw in the Board's analysis is that the distinction between unilaterally implementing new terms and negotiating new terms is one of which, it seems safe to say, employees cannot be expected to have knowledge; in other words, employees would still view statements like those the Company made about negotiating a new contract and employment terms as foretelling new employment terms were in the works. The analysis also puts the proverbial cart before the horse, requiring an after-the-fact assessment whether a successor is a perfectly clear successor to decide the import of what it communicated to the employees. And, most importantly from a legal perspective, the Board's finding that the Company's telling the employees it would negotiate a new contract and certain terms would be subject to negotiation cannot, as the Company demonstrates in its principal brief, be reconciled with the Board's

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the Company's work rules. (Appendix 125, 151). While the statements were made by a District employee, they were made in the presence of the Company's representatives, whose silence served to adopt them, and thus the statements provide compelling additional evidence that the employees were on notice at the meeting that First Student, if awarded a contract, would be making changes to their terms and conditions of employment. See e.g., *Henry M. Hald High School Ass'n*, 213 NLRB 415, 419 (1974) (successor that told employees their union contract would be null and void held not to be perfectly clear successor).

decisions in *Banknote Corp. of America,* 315 NLRB 1041 (1994), enfd. 84 F.3d 637 (2d Cir. 1996), and *Marriott Management Services, Inc.,* 318 NLRB 144 (1995). Neither the Board nor the Union offer a meaningful distinction between those cases and this one. In *Banknote* the determination the respondent was not a perfectly clear successor was predicated exclusively, and in *Marriott* primarily, upon the respondent's communicating that it was not going to be bound by or adopt the predecessor's labor agreement. 315 NLRB at 1043; 318 NLRB at 144. The Board has no escape from the import of those cases here.[7]

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[7] Quoting in full the Board's finding in *Banknote* leaves no doubt the Board's finding here cannot be reconciled with its finding there:

> Although in its March 23 letter to the Unions the Respondent stated its "intention to attempt to hire its initial work force from among the employees currently working at the Ramapo facility," this letter also effectively announced that it would be instituting new terms and conditions of employment. Specifically, the Respondent's statements in the March 23 letter disavowing the notion that the Respondent had agreed to be bound by the terms and conditions of the ABN collective-bargaining agreements and declaring that the Respondent had "not made any such commitments" put the employees on notice that the Respondent would be making changes in the employment terms of the predecessor. In our view, the Respondent's statements in the letter convey to the predecessor's employees the message that the Respondent would not be adopting the predecessor's terms and conditions of employment. Thus, simultaneous with its stated intention to retain the predecessor's employees, the Respondent announced new terms and conditions of employment.

315 NLRB at 1043.

C. First Student Timely Exercised Its Right To Establish New Terms Of Employment

The Court need only reach the question whether First Student, at the meeting with the District's employees on May 17, 2012, timely exercised its right unilaterally to establish new employment terms if the Court affirms the Board's finding the Company became a perfectly clear successor at the March 2, 2012 meeting with the District's employees. If the Court does affirm the finding, then the first and perhaps only question the Court must answer is whether the Board reasonably interpreted the Act, consistent with the underlying statutory scheme, in holding that:

> [A] subsequent announcement of new terms, even if made before formal offers of employment are extended, or before the successor commences operations, will not vitiate the bargaining obligation that is triggered when a successor expresses an intent to retain the predecessor's employees without making it clear that their employment is conditioned on the acceptance of new terms.

(Appendix 632).

The Board based that interpretation of the Act upon the "significant reliance employees may place on statements of intent to hire, to the exclusion of other employment opportunities," adding that:

> Holding a successor to its initial statements of intent, even when those statements are made before formal offers of employment are extended or the transfer of ownership or operations is complete, prevents prospective employers from inducing such reliance, only later to reveal that the employees' terms of employment will be changed. It also serves the important statutory policy of fostering industrial peace in what the Supreme Court has recognized may be an unsettling

> transition period for unions and employees alike. See *Fall River Dyeing &Finishing Corp.,* 482 U.S. 27, 39–40 (1987).

(Id.).

First Student does not dispute these reliance-based policy considerations justify reasonable restrictions on a successor's ability to undo perfectly clear successor status once triggered and regain its right unilaterally to establish initial terms of employment. The Company's position is that the considerations do not justify an irreversible forfeiture of the lost right unilaterally to establish initial employment terms where the evidence establishes that any reliance the predecessor's employees may have placed on perfectly clear, retention-based statements could not, prior to the successor's announcement of new terms, reasonably have affected their ability timely to seek other employment. This is such a case.

Here, First Student was found to have become a perfectly clear successor while a contract was still being negotiated, a period during which the reliance interests of the District's employees necessarily were not as strong as they would have been if a contract had already been entered, and the Company's economic interests in shaping the terms of its agreement with the District were at their strongest. When that changed with the School Board's approval of the transportation services agreement on May 16, 2012, it was less than a day later that the Company, on May 17, 2012, informed the District's employees of the employment terms under which it would offer them employment. And it was not

until over three months later that the Company completed hiring its workforce and commenced operations, more than sufficient time for any employees who were unhappy with terms offered by the Company to look for other work.

The Board and Union refer extensively in their briefs to what this Court had to say on this topic in its decision in *Machinists*. As the Company reads the decision in that case, room exists to find, as the Company argues here, that the Board erred in interpreting the Act to preclude a perfectly clear successor from ever recapturing the right unilaterally to set initial employment terms.[8] First Student urges the Court to take this opportunity to find that a reasonable interpretation of the Act required the Board to formulate a standard based upon an assessment of the effect of a successor's perfectly clear, retention-based statements

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[8] Support for reading the decision that way is provided primarily in the following example given by the Court on when a successor that does not initially announce new employment terms to the predecessor's employees may later lose the right unilaterally to implement new terms:

> If, for example, the successor indicates that he intends to reemploy his predecessor's work force a month hence, and when employees arrive to submit applications two weeks later he informs them that substantially different terms will be instituted, some incumbents may decide to look for work elsewhere. Nevertheless, a duty to bargain with respect to the proposed changes could possibly be properly imposed on either of two grounds. For lack of sufficient time to rearrange their affairs, incumbents might be forced to continue in the jobs they held under the successor employer, notwithstanding notice of diminished terms, and perpetuation of the work force and as well the representational status of the incumbent union may be assured.

595 F.2d at 675, n.49.

on the reliance interests of the predecessor's employees and the effect of the successor's forfeiting its right to set initial employment terms on its economic interests.

IV. CONCLUSION

For all of the foregoing reasons, and the reasons stated in its principal brief, First Student respectfully requests that the Court grant the Company's Petition for Review, and deny enforcement of the Board's Decision.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, David A. Kadela, do hereby certify that this brief complies with Rule 32(a)(5) and (7)(B) of the Federal Rules of Appellate procedure. The brief utilizes a 14-point proportionally spaced face for text. The brief contains 4,512 words according to Microsoft Office Word 2010, the word-processing system used to prepare the brief.

Dated: February 21, 2019

Respectfully submitted,

s/David A. Kadela
David A. Kadela
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Attorney for Petitioner/Cross-Respondent
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing *Reply Brief of Petitioner/Cross-Respondent First Student, Inc.* was electronically filed on this 21st day of February 2019. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's electronic filing system.

s/David A. Kadela
David A. Kadela

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